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IN THE

Supreme Court of the United States

October Term, 1959.

No. 107.

FRANK MALFI,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITIONER'S REPLY BRIEF.

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The nature of the government's opposition to review in this case suggests that a short reply may be of assistance to the Court.

I.

Seven times in *Harris v. United States*, 359 U. S. 19 this Court used the words "direct evidence." This Court is aware of the difference between direct evidence and indirect or circumstantial evidence. *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500; I Wigmore *Evidence* (1940 Ed.) §§ 24, 41. The government sweeps this distinction under the rug.

Of course, circumstantial evidence may be more persuasive than direct evidence but that is not the point here involved. Where guilt rests on a presumption from possession—as it does here—that possession must be conclusively shown—not presumed from circumstances. *People v. Leavitt*, 301 N. Y. 113, 92 N. E. 2d 915.

The government could have indicted petitioner under several other provisions of the law relating to transactions

concerning narcotics. The Internal Revenue Code is replete with punishment for unauthorized dealers in narcotics. For example, see 26 U. S. C. §§ 4704(a), 4705(a), 4721-4724, § 4742. None of these sections require proof that the goods were actually imported contrary to law, nor that defendant knew them to be so. None of them require physical possession as an element of the offense defined, although possession constitutes prima facie evidence of such offense. Significantly § 4724(c) expands the definition of possession to include *control* as presumptive evidence of a violation. This is not true of 21 U. S. C. § 174.

The record here is devoid of any direct evidence that petitioner was in possession of the narcotics. The government does not deny this fact. The evidence in this case may be sufficient to sustain the conclusion that petitioners helped to arrange the sale of the narcotics from his "connection" that he aided and abetted in their transfer, that he was a participant in a conspiracy to transfer. But lacking, as here, proof of the two additional elements—namely, that the drugs were imported, and that petitioner knew it—essential to this offense in the absence of the presumption authorized by the statute from the possession of the narcotics—the evidence is not sufficient to sustain the sentences on Counts I and III.

Proof of possession is obviously not necessarily a part of a sale. *United States v. La Rocco*, 224 F. 2d 859 (C. A. 2, 1955).

II.

(a) Rule 30, F. R. Crim. P., provides that an objection should be made before *not after* the jury retires. The Record shows that the last words of the Court's charge were: "You may retire." (R. 57a.)

(b) Petitioner in his renewal of motion for judgment of acquittal and an alternative motion for a new trial re-

served the right to file additional and more specific reasons after the charge of the court had been transcribed (R. 58). The record shows that petitioner was sentenced April 9, 1958 after a hearing but the transcript of the trial proceedings was filed May 7, 1958 only after appeal (R. 1).

(c) Although the sentences are concurrent on the four substantive counts, if any are invalid a reduction of sentence might have occurred. See note, 107 U. Pa. L. Rev. 726 (1959).

In view of the importance of the questions involved in the enforcement of the narcotic laws the petition for certiorari should be granted.

Respectfully submitted,

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